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IS THE PRINCIPAL FUNCTION OF INTERNATIONAL
HUMAN RIGHTS LAW TO ADDRESS
THE PATHOLOGIES OF INTERNATIONAL
LAW? A COMMENT ON PATRICK MACKLEM'S
THE SOVEREIGNTY OF HUMAN RIGHTS[†]

I aim to provide a critique of Patrick Macklem's thesis in The Sovereignty of Human Rights that the function of human rights in international law should be seen 'in terms of their capacity to monitor the structure and operation of the international legal order . . . requir[ing] the international legal order to attend to pathologies of its own making.' I suggest an alternative account that seems to me to be more consistent with much of the practice that he describes, but I rearrange it to provide a more convincing narrative. The function of human rights in international law does have the function that Macklem attributes to it, among others, but to claim that this is the C function of international human rights law is to underestimate the complexity of human rights as well as their true significance (at least in my view). An analysis of international human rights law must take this complexity into account if a coherent and convincing explanation of the normativity of international human rights law is to stand any chance of being identified.

Keywords: sovereignty, human rights, international law, jurisprudence, pluralism

Patrick Macklem's aim in *The Sovereignty of Human Rights* is set out boldly on the first page. His aim, he says, is to 'offer a legal theory of human rights in international law that defines their nature and scope.'¹ In doing so, the book sets out several steps that lead, argues Macklem, to an equally bold thesis: that the function of human rights in international law should be seen 'in terms of their capacity to monitor the structure and operation of the international legal order . . . requir[ing] the international legal order to attend to pathologies of its own making.'² In this brief comment on Macklem's complex and wide-ranging tour de force, I applaud the ambition of the enterprise, I agree with much of the analysis, but I ultimately disagree with the thesis itself, for reasons that I will

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[†] I am most grateful to David Dyzenhaus for helpful comments on an earlier draft.

¹ Patrick Macklem, *The Sovereignty of Human Rights* (Oxford: Oxford University Press, 2015) at 1 [Macklem, *Sovereignty*].

² *Ibid* at 1.

explain. The function of human rights in international law does have the function that Macklem attributes to it, among others, but to claim that this is the principal function of international human rights law is to underestimate their complexity as well as their true significance (at least in my view).

This article is in three parts. In the first, I aim to provide a critique of Macklem's thesis. In the second part, I suggest an alternative account, that seems to me to be more consistent with much of the practice that he describes **but rearranges it** to provide a more convincing alternative narrative. The third part concludes.

I Critique

There are now several sustained attempts by political philosophers to theorize about the meaning, scope, and justification of human rights. One significant difference between these varied philosophical approaches has to do with methodology: where do we start if we want to provide a normative account of human rights? One strand of philosophical theorizing has attempted to provide accounts that begin from the practice of human rights (practice-dependent theories). There are several varieties of such an approach, but one of the most prominent examples is taken by a group of philosophers who have been identified as adopting a 'political' **approach**, an approach particularly associated with John Rawls,³ Joseph Raz,⁴ and Charles Beitz,⁵ among others. In contrast, other philosophers provide accounts based initially on *a priori* reasoning (practice independent). There are also several examples of this approach, but the most prominent recent exemplars are John Tasioulas⁶ and James Griffin.⁷ They are sometimes described as adopting an 'orthodox' or 'moral' approach.

Macklem's approach is rooted firmly in the practice-dependent approach and partly follows the 'political' **approach**. He contrasts his approach with what he describes as the 'moral accounts' of those such as

³ John Rawls, *The Law of Peoples*, rev ed (Cambridge, MA: Harvard University Press, 2001) [Rawls, *Law of Peoples*].

⁴ Joseph Raz, 'Human Rights without Foundations' in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 321 [Raz, 'Human Rights'].

⁵ Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2011).

⁶ John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) *Current Legal Probs* 1 at 22; John Tasioulas, 'Are Human Rights Essentially Triggers for Intervention?' (2009) 4 *Philosophy Compass* 938.

⁷ James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008).

Tasioulas and Griffin, which he criticizes because ‘human rights in international law are not those that moral theory generates,’ and moral accounts of human rights ‘are not normative accounts of international human rights law.’⁸ Despite the fact that the jurisprudence of human rights is part of human rights practice in a broad sense, no prominent practice-dependent philosopher, including those from the ‘political’ tradition, accords any significant place to the contemporary jurisprudence of human rights in their accounts of human rights practice. This seems to me both puzzling and a significant gap in practice-dependent approaches. Recent philosophical accounts of human rights that purport to be based on the actual practice of human rights are flawed, therefore, in so far as they seldom engage in a sustained way with the international judicial interpretation of human rights guarantees, focusing instead mainly on the international political practice of human rights (Rawls,⁹ Raz¹⁰), on the constitutional text and the limited judicial practice of one state (Jürgen Habermas¹¹), on the international treaty texts (Allen Buchanan¹²), or on historical developments without appreciating the role of judicial practice in that history (Hans Joas¹³).

Macklem’s approach, on the contrary, rightly integrates the jurisprudence of human rights firmly within the practice of human rights. The significance of this move should not be underestimated. It poses, I suggest, a major challenge to current ‘political’ approaches and marks one significant way in which Macklem begins to distance himself from current ‘political’ approaches. I agree, therefore, with Macklem’s implicit critique of previous attempts in philosophy and political theory to engage with the meaning, scope, and justification of human rights. I also agree that, if we are to take a practice-dependent approach to the role of international human rights law, we need to situate it in the practice of international law more broadly.

However, while I agree that one cannot understand the role of international human rights law without so situating it, I equally do not think one can understand international human rights law without situating it within human rights law more broadly, including transnational and domestic human rights law. I suggest, therefore, that Macklem does not

8 Macklem, *Sovereignty*, supra note 1 at 13 (emphasis added).

9 Rawls, *Law of Peoples*, supra note 3.

10 Raz, ‘Human Rights,’ supra note 4.

11 Jürgen Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’ (2010) 41:4 *Metaphilosophy* 464.

12 Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013) [Buchanan, *Heart of Human Rights*].

13 Hans Joas, *The Sacredness of the Person* (Washington, DC: Georgetown University Press, 2013).

take his own preferred approach seriously enough in this regard and that if we are interested in providing an account of the role of international human rights law, we should integrate more fully what is occurring at the national level in human rights law into the international human rights narrative. I want to make a case, therefore, for the inclusion of the activities of judicial institutions (national and international) in accounts of human rights that purport to grow from human rights practice.

It is true that the importance of the local and the domestic in fully understanding the role and function of international human rights is mentioned, albeit briefly, early in the first chapter,¹⁴ but, thereafter, it is significantly downplayed. This is unfortunate, I think, because it misses the significance of Karen Knop's observation,¹⁵ quoted by Macklem,¹⁶ which suggests that the role (and perhaps even the meaning) of international human rights may diverge significantly at the national level. So, too, it misses the significance of Anne Peters's insight, also cited by Macklem, that 'international and domestic legal orders work together to ensure respect for human rights.'¹⁷ This is the area of scholarship that is now termed 'comparative international law,' an approach that needs to be more fully integrated into an explanation of the type that Macklem is attempting.

For example, in a recently published article in the *American Journal of International Law* concerning the domestic interpretation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), I argued that the observable patterns of references to CEDAW in national level courts may result, to a significant degree, from the combination of four elements that, taken together, are unique to international human rights law in this setting: that it is international law; that it concerns human rights; that it is law; and that it is being applied domestically.¹⁸ The first three elements combined offer domestic courts a set of norms that is consensus based ('international') and purportedly universal ('human rights'), which courts and legal advocates are able to

¹⁴ Macklem, *Sovereignty*, supra note 1 at 5.

¹⁵ The relation between domestic and national law now involves "a process of translation from international to national", producing "new meanings." Karen Knop, 'Here and There: International Law in Domestic Courts' 32 NYU J Intl L & Pol (2000) 501 at 506.

¹⁶ Ibid at 5.

¹⁷ Ibid at 38 (this is Macklem's description of Anne Peters, 'Humanity as the Σ and Ω of Sovereignty' (2009) 20 EJIL 513).

¹⁸ Christopher McCrudden, 'Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW' (2015) 109:3 AJIL 534. *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 49.

draw on ('law'), in order to help address domestic concerns or escape from otherwise troublesome 'domestic' constraints.

If true, this seems a significant challenge to Macklem's thesis. In particular, it seems to challenge his argument that international human rights 'speak to injustices produced by the field [that is, international law] itself, not to abstract wrongs such as those contemplated by moral conceptions of human rights.'¹⁹ Leaving aside, for the moment, Macklem's point about 'abstract wrongs' and 'moral conceptions,' and focusing only on the scope of the field, this statement appears to be correct only if 'the field' is not broadened (as I suggest it should be) to locate international law within a broader legal frame. My argument is not intended to suggest, however, that international law operating at the international level does not exist as a distinct field, only that international human rights law appears to play a more complex role *vis-à-vis* domestic law, and vice versa, than Macklem seems to suppose – or, at least, than he seems to suppose **on some occasions**. On other occasions, he accepts that the fact that because 'international law aims to regulate national legal orders does not necessarily mean that national legal orders accept how they are conceptualized in international law,' but this insight does not seem to be followed through in terms of analyzing the functions that international human rights law now plays.²⁰

The previous paragraph hints at another problem with Macklem's approach. A critical dimension of any explanation of human rights legal practice must be that human rights law is not static, that it may change radically over time, and that it may vary considerably between jurisdictions. As a result, a broader understanding of what constitutes relevant practice (including national judicial practice, for example) would also require practice-dependent theories to confront the significant degree of substantive pluralism in our understandings of human rights as currently interpreted. I have suggested in a recent book that

[h]uman rights law appears to lack an uncontested structure, content, method or consistent theoretical underpinning across jurisdictions. This legal pluralism appears to be the result of claims involving competing and, sometimes, incompatible substantive values, each supported by credible human rights sources and interpretations. Human rights, as interpreted by the courts, function in apparently contradictory ways: they look forward, but also backward; they appeal to both communitarian and individualistic values; they juggle both the particular and the universal; they struggle between continuity and change; they empower

¹⁹ Macklem, *Sovereignty*, supra note 1 at 40.

²⁰ Ibid at 44.

the state, and they challenge its power. Courts seem to be constantly caught in these opposing forces.²¹

Macklem does not seem to me to fully face up to the challenge that this pluralism poses for his thesis. He argues that ‘international law . . . structures global politics by a binary opposition between legality and illegality, conferring legal authority on some claims of economic and political power and rejecting others as international illegalities.’²² But, surely, this is exactly what international human rights usually fails to do in practice, not least because there is no once-and-for-all, final authoritative decision maker on the legal issues involved. Any legal decision about a contested area of human rights is often quite provisional and subject to varying degrees of continuing legal debate and challenge. Macklem, of course, recognizes this at a significant point in chapter 3, where he speaks of the ‘deep contestation that arise[s] in the context of particular disputes that frame them in continually new and unpredictable ways’²³ and recognizes that the content of human rights ‘is constantly open to contestation,’ but the full implications of this insight are left unexplored in the case studies that form the second half of the book.²⁴

A broader understanding of that practice would take more seriously the institutional context in which human rights operate. For example, philosophical approaches require a deeper engagement with the fact that so many different institutions are so heavily involved. This poses a challenge, in particular, to those seeking to project a view of human rights as laying down authoritative standards. More often, I will suggest below, international human rights provide the forum and the language for continuing debate and argument, but little closure. I agree wholeheartedly, therefore, with Macklem’s description of ‘human rights as legal sites of moral and political contestation over fundamental questions about the structure and operation of international law’ itself²⁵ and that these debates are cast ‘in distinctively legal terms,’²⁶ but I do not think that addressing the pathologies of international law is primarily the distinct function(s) of international human rights law.

Although there are hints in the first quotation in the previous paragraph (‘human rights as legal sites of moral and political contestation’)

²¹ Christopher McCrudden, ‘The Pluralism of Human Rights Adjudication’ in Liora Lazarus, Christopher McCrudden & Nigel Bowles, eds, *Reasoning Rights: Comparative Judicial Engagement* (Oxford: Hart Publishing, 2014) 3.

²² Macklem, *Sovereignty*, supra note 1 at 24.

²³ Ibid at 65.

²⁴ Ibid.

²⁵ Ibid at 2.

²⁶ Ibid at 26.

that something like the moral conception of human rights must play a role, what is missing from Macklem's account, I suggest, is a consistent, thick, and convincing account of the unique normativity of human rights law. There is little in the argument that Macklem advances that seems to distinguish clearly international human rights law from other parts of international law. For example, much of international economic law (including international trade, investment, and public procurement law) could be usefully categorized as having the same or very similar functional characteristics as Macklem sees international human rights law as possessing ('monitor[ing] the structure and operation of the international legal order . . . requir[ing] the international legal order to attend to pathologies of its own making'²⁷).

What appears to be missing is any convincing account of the normativity of international human rights that distinguishes it, for example, from international trade law. Where this is attempted, the results are both vague and (potentially, at least) inconsistent. There is, for example, a persistent identification of the role of international human rights as addressing 'pathologies' in the system of international law itself, but what are the pathologies that international human rights in particular seeks to address?

The most common term that Macklem uses to describe the pathology to be addressed is 'injustice,' which is used (in somewhat different ways) over seventy times throughout the book. At other times, however, the 'pathology' to be addressed seems to be expressed in rather different terms. In his important first chapter, he recognizes that '[p]reventing a State from threatening *essential features of what it means to be human* . . . is . . . part of the real normative terrain of international human rights law,' although he considers it 'but a small part.'²⁸ In the second chapter, international human rights is defined as consisting of 'instruments that seek to regulate the relationship between the individual and the State in order to protect *interests that we all share as humans*.'²⁹ Do all of these italicized phrases mean the same thing? I do not think so.

In any event, it does not seem to matter to Macklem because the function of human rights is rather different in his view. It is not to advance 'any universal or moral attributes'; instead, it 'is to address the fact that international law authorizes States to exercise sovereign power in ways that threaten the interests that such rights seek to protect [whatever they are]'.³⁰ But this brings us back to what the difference is between

²⁷ Ibid at 1.

²⁸ Ibid at 23 (emphasis added).

²⁹ Ibid at 35 (emphasis added).

³⁰ Ibid at 65.

international trade law and human rights since the former could equally well be described in these terms.

As should be clear by now, I broadly agree with Macklem's general strategy of distinguishing practice-dependent and practice-independent approaches, but where we seem to differ is that I am attracted by this distinction only as an initial heuristic device. In practice, the sharp distinction he seeks to draw between these two approaches is overdrawn. Contrary both to Macklem and to current practice-dependent philosophical approaches, and somewhat paradoxically, more attention to actual legal practice would question whether 'practice-dependent' approaches should be quite as dismissive of 'orthodox' or 'moral' approaches as they are. Although Macklem recognizes that the international human rights norms 'inescapably possess normative dimensions,' he argues that 'forays into moral theory to determine their normative content remain tethered to the international legal order.'³¹

But this does not seem to me to reflect international legal practice. Quite often, I suggest, it is tethered to 'orthodox' understandings of human rights, hence the popularity of discourse drawing on concepts such as human dignity. It is unconvincing to argue that 'human dignity' is 'tethered to the international legal order,' given that its purpose is precisely not to tether it to any particular institutional manifestation, national or international. It claims, after all, to be a universal principle. I agree that the normativity of concepts such as human dignity 'is one that is internal . . . to international law,' in Macklem's words, but it is also 'external' to international law, including in national law. In other words, Macklem's practice-dependent approach is incomplete as it stands at the moment. A preferable approach is one refined by the inclusion of distinctively 'orthodox' elements, in particular, the idea that human rights derive their normative power from being seen as in pursuit of human dignity. There are something like ten references at critical points in the book to this concept,³² yet there is little attempt to integrate it into his normative account. The moral conception of human rights has to do some of the heavy lifting, but how much or in what way is left largely unexplored.

So far as I am aware, neither international human rights courts, tribunals, or committees, nor domestic human rights courts, tribunals, or committees, mention a Macklem-type rationale in justifying their decisions. What are we to make of this omission? Interestingly, I think, the question raises a deeper issue as to the nature of the explanation of

³¹ Ibid at 22.

³² Ibid at 3, 60, 66, 67, 70, 75, 77, 84, 146, 200.

practice that Macklem provides. If, as sometimes seems to be the case, he purports to take an internal point of view, *à la* H.L.A. Hart, then a significant problem with Macklem's thesis is that one might have expected, from an internal account explicitly based on practice, that those interpreting international human rights standards would themselves, at least some of the time, advert to the kind of explanation he provides as the basis for their decision in any particular case. But if, as also often seems to be the case, he is actually adopting a more external approach, as his earlier critical legal studies stance would require, then perhaps it is less surprising that his explanation would not figure in legal argument. But this tension – is it an internal or an external account? – is nowhere resolved.

II *An alternative approach*

The question is what, if anything, distinguishes international human rights law from the rest of international law and also provides the glue that holds the ever-increasing material scope of specific human rights (freedom of religion, freedom of expression, the right to strike, the right to clean water, and a right to a basic minimum income, for example) together as a coherent, consistent whole? Is an alternative normative theory to Macklem's possible, one that is broadly consistent with much of his account of practice but also addresses the problems in his account that I have raised in the previous part of this article? I think so, and my aim in the remainder of this article is to advance this alternative theory, provisionally and tentatively.

My starting point looks strikingly Hartian, but it is the Hart of *Punishment and Responsibility*³³ rather than the Hart of *The Concept of Law*,³⁴ or the Hart of 'Are There Any Natural Rights?'³⁵ Hart distinguishes at least two justificatory issues in constructing a normative theory of punishment. First, what is the 'general justifying aim' of the system? What justifies the creation and maintenance of such a system – what good can it achieve, what duty can it fulfil, what moral demand can it satisfy? Second, he distinguishes the methods adopted to further this system, including who may properly be punished and how the appropriate amount of punishment should be determined. We need to distinguish, in other words,

³³ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2d ed (Oxford: Oxford University Press, 2008).

³⁴ HLA Hart, *The Concept of Law*, edited by Penny Bulloch & Joseph Raz (with an introduction and notes by Leslie Green), 3d ed (Oxford: Oxford University Press, 2012).

³⁵ HLA Hart, 'Are There Any Natural Rights?' (1955) 64:2 *Philosophical Review* 175.

the general justifying aim of the system, from how we pursue that aim – crudely, a means/end distinction. Hart argues that we find that quite different (and even, potentially, conflicting) values are relevant to these different issues about punishment and that any complete normative account of punishment will have to find a place for these differing values – in order to help us find some way of deciding between them when they conflict.

I think that this general strategy is also useful in analyzing the human rights ‘system’ and the place of human dignity in it. Incidentally, Allen Buchanan’s recent book adopts a similar starting point.³⁶ We need to modify the Hartian strategy in one major respect, however. I do not assume, as I think Hart (and perhaps also Macklem) sometimes seems to, that there must be a set of justifications there to be identified. Normative theorists must be open to the possibility that the practice cannot be justified, if there is no coherent set of moral justifications in the human rights context. I believe, in fact, that a set of normative justifications do exist, but we cannot simply assume that they must exist.

My suggestion is that the general justifying aim of human rights, identified from the practice of human rights, is the pursuit of human dignity, in the sense that each human person, qua human person, possesses an intrinsic worth that should be respected. I will call this the ontological claim. There is much in Macklem’s own analysis that seems to me to support this claim, but, more significantly, this is the concept that above all others (certainly above ‘justice’) is most commonly found in all international human rights instruments and, increasingly, in judicial practice and that appears to be regarded as foundational to human rights, as a whole. It is here that I depart most significantly from Macklem’s analysis, particularly when he states baldly: ‘Whether civil and political rights, and the interests that underlie them, relate to essential features of what it means to be human and therefore exemplify moral conceptions of human rights thus has little to do with their function in international law.’³⁷

However, although mine is a foundationalist claim, it is a weak foundationalist claim. In particular, we should not infer that the idea of human dignity instantiates any particular understanding of what the value of the human person consists of. It is not necessarily an understanding of dignity as autonomy, or of equality, or of communitarianism. In particular, it is not necessarily a liberal agenda. It is simply a claim that a human person has a moral worth as a person. I suggested in an earlier article

³⁶ Buchanan, *Heart of Human Rights*, supra note 12.

³⁷ Macklem, *Sovereignty*, supra note 1 at 65; see generally at 64–7.

that two elements, also rooted in the practice that Macklem describes and deriving from the claim to human dignity, have developed which limit the methods of pursuing this aim.³⁸ These also are weak claims. First, some forms of conduct between persons are inconsistent with respect for this intrinsic worth (the relational claim). Second, the state exists for the individual, not vice versa (the limited state claim). The different understandings of each of these elements of the concept of human dignity indicate that different conceptions of human dignity, and different ways of pursuing it, are identifiable. The fault lines lie in disagreement as to what the intrinsic worth of persons consists in, what forms of treatment are inconsistent with that worth, and what the implications are for the role of the state.

Weak though it is, however, the general justifying aim I have identified also provides a moral foundation for the system of human rights as a whole. Here is where another difference with Macklem emerges. Rather surprisingly, Macklem considers that only political and civil rights may be underpinned by the concept of human dignity, not social and economic rights, because the latter ‘purport to provide individuals with access to resources.’³⁹ But this approach seems to have little to do with the actual practice of human rights, where human dignity is often drawn on as the basis for social and economic rights, if not more than for civil and political rights.

Note that I distinguish between human dignity and human rights. Human rights are to be seen as one strategy by which human dignity is pursued. It is not the only way in which it is pursued. The human rights system, then, consists of a set of norms that are institutionalized in related, but different, sets of practices: international, diplomatic, legal, constitutional, moral, revolutionary, and so on. In this, my approach is clearly influenced by Rawls in the sense that human rights do not just exist out there floating free but, rather, they have to be institutionalized to make them ‘real.’ Where I differ from Rawls (and in a different way from Macklem) is that I do not limit the institutionalization of human rights to the narrow range of institutions that they appear to.

Each of these elements of human rights practice has its own normative foundation in play that means that different rights aiming to further human dignity will (perhaps even should) result. There is, for example, a set of legal institutional considerations and constraints that mean that not all legal human rights are also moral human rights, and vice versa. Dignity also provides a critique of the human rights system. It is perfectly

³⁸ Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19:4 EJIL 655.

³⁹ Macklem, *Sovereignty*, supra note 1 at 70.

compatible with my approach – indeed my approach requires – that each area of human rights practice can, and should, be scrutinized for whether it does not adequately pursue human dignity. It provides, therefore, a constraint on what human rights can consist of in each of these areas of practice, but, again, it is a weak constraint. It would reject an attempted justification of an approach to the pursuit of human rights that simply handed all power over to an unconstrained state, but, beyond that, it is deeply contested as to what is required.

In practice, these critiques are both internal and external (using these terms in a somewhat difference sense than before) to these areas of practice. Each develops over time particular ways of understanding the general justifying aim and, therefore, provides the opportunity for an immanent critique of the understanding of human rights within that area. But the fact that there are different areas of human rights practice means that there is the possibility that one area of practice's understanding of the general justifying aim may conflict with that of another, and this both encourages and facilitates the external critique of the approach to human rights adopted in each area of practice.

This is highly relevant to the relationship between practice-dependent and practice-independent approaches. Judges, for example, sometimes need to draw on philosophical understandings of human rights, irrespective of whether these philosophers claim to be practice dependent or practice independent. Given this, we should not be surprised to find that judges are likely to engage with practice-independent approaches, including those approaches that would be considered to be 'orthodox.' To that extent, therefore, judicial practice can and does accommodate insights from these philosophers, and, in doing so, the judicial practice of human rights changes and adapts as new issues arise or old issues are reconsidered. When practice-dependent philosophers then take judicial practice seriously into account, as it is strongly suggested they should, they will have to describe a practice that incorporates to some extent practice-independent philosophers of human rights as well as practice-dependent philosophers. Both will have become part of the practice of human rights.

Thus far, I have suggested an approach that combines a weak general justifying aim based in dignity, with a recognition that the pursuit of that aim may involve the adoption of human rights in different institutional forms, in different contexts, and with different content. This is vital for understanding the normative pluralism of human rights practice, because the pursuit of dignity through according human rights is necessarily constrained by the normative understandings of each institution and its institutional logic, set in particular contexts.

Each area of practice will also have its own method of discourse. In practice, what we see is that human rights arise out of contestation, power struggles, and ideological conflict within and between these different areas of practice. And some (indeed, many) of those conflicts concern the very understanding of what it means to respect the human worth of the person, and the role of the state in this understanding. Discourse, debate, and contestation are not marginal to the practice of human rights, but central to it, and this contestation takes place as much within particular areas of practice as between them.

Under my suggested approach, the lack of resolution of the contradictions in the international adjudication of human rights law disputes, for example, is not to be regarded as a failure but, rather, as an essential element of the practice of human rights. The practice of human rights adjudication, human rights law, and human rights courts, becomes the site of a provisional and (politically) temporary accommodation that helps us to live together, despite the basic conflicts that are brought to court. We agree to abide by the decisions of a decision maker whom we agree, for the moment at least, is broadly legitimate and competent. Human rights adjudication is seen as an enterprise in which the judge is not only engaging with the dispute in hand, attempting to arrive at a justified and reasoned judgment, but also doing so in a context in which the nature of the judge's resolution of the question is provisional.

My approach rejects the view that the pluralism existing at present in human rights adjudication is chaotic in ways that are dysfunctional. My approach accepts that human rights law, for example, is pluralistic but argues that this pluralism is not randomly chaotic, or dysfunctional, or temporary. From this perspective, international human rights law is seen as providing a forum in which tensions and conflicts over some of the most basic ethical, epistemological, and ontological questions are engaged. From this perspective, it would be puzzling if a highly pluralistic system of human rights had not emerged. The pluralism of the system is not, therefore, a problem to be overcome but, rather, a critically important and central aspect not only of the proper understanding of human rights law but also of human rights *tout court*, one to be recognized and cherished for the critical reflexive function it encourages.

My preferred approach is not, therefore, a static model but, instead, one that is open to continuing change, including change involving the continued suitability of international human rights law to provide the forum in which these contested questions are considered at all. Not only is the actual result in a particular case open to revision, but the judge's legitimacy in arriving at the decision at all is also provisional. That is an important and defensible role for human rights law, and human rights courts, but it is a modest one.

III *Conclusion*

To conclude, this sketch (it is no more than that) of my alternative meta-theory, arising out of a critique of Macklem's stimulating book, challenges several aspects of recent philosophical discussions of human rights, including Macklem's own. Including the jurisprudence of human rights in normative theories of human rights encourages a reformulation of practice-based theories to include more attention to the evolution of human rights at the national, as well as at the international, level. I suggest that much more attention should be paid to dialogic and dialectic processes that embrace sustained and reflexive contestation, pluralism, judicial institutions, and social activism. I propose ways to develop a partial *détente* between philosophical theories that are built on practice and those that are not, in which the former also provides an account in which principles drawn from ideal theories become incorporated into human rights practice, which, in turn, must be taken account of by practice-dependent theories. Examining judicial approaches to the supposed universal idea of dignity, finally, provides a more satisfactory explanation of how human rights are conceived to be both dependent on the state and to lie beyond it – to be part of international law and to lie beyond it. An analysis of international human rights law must take this complexity into account if a coherent and convincing explanation of the normativity of international human rights law is to stand any chance of being identified.